



The Comptroller General
of the United States

Washington, D.C. 20548

135849

Timmerman

Decision

Matter of: Loral EOS/STS, Inc.

File: B-230013

Date: May 18, 1988

DIGEST

1. Where protester proposed a training simulation system which may be configured in two ways, the agency's exclusion of the proposal from the competitive range because it determined only one deficient configuration was offered and therefore substantial revisions to the proposal would be necessary in order to meet the solicitation's requirements regarding hit point accuracy is improper because the record shows the proposal already contained information needed to determine accuracy for the alternate configuration and a major change in hardware was not required.
2. Agency exclusion of proposal from competitive range based on deficiency concerning one of nine required simulator sights is improper where the record shows the deficiency may be susceptible of correction through discussions.
3. Exclusion of protester's proposal from competitive range because it required additional special test equipment instead of offering built-in testing is not supported by the record where the proposal indicated the special test equipment was simply recommended extra equipment that was in addition to the built-in test equipment offered.

DECISION

Loral EOS/STS, Inc., a joint venture of Electro-Optical Systems Corp. and SAAB Training System AB, protests its exclusion from the competitive range under request for proposals (RFP) No. N61339-87-R-0029, issued by the Naval Training Systems Center for the acquisition of Tank Weapon Gunnery Simulation System (TWGSS) and Precision Gunnery System (PGS) training devices.

The protest is sustained.

042193.

The protester argues that the agency's decision to exclude it from the competitive range based on technical unacceptability is incorrect because the deficiencies listed by the agency either do not exist or if they do, are not of sufficient magnitude to justify exclusion from the competitive range. While we find certain of the agency's actions to be reasonable, overall we agree with the protester that the deficiencies in its proposal did not warrant its elimination from the competitive range.

The training devices to be procured provide gunnery training for armored vehicle crews without the necessity of firing actual ammunition. The TWGSS device is for use with M1, M1A1 and M60A3 tanks while the PGS is for the M2/M3 Bradley Fighting Vehicle. The training devices are mounted on the vehicles and simulate and compute gunnery or missile accuracy when firing at targets.

The RFP, which contemplated the award of a firm-fixed-price contract, was issued on May 29, 1987. Technical considerations were given equal weight with price and award was to be made on the basis of "best value" for the government. On the August 6 closing date the agency received several proposals, including Loral's. The Navy informed Loral by letter dated November 25 that its proposal was excluded from the competitive range because:

"a. The proposed design for the M60A3 tank and the M2/M3 Bradley Fighting Vehicle cannot meet the critical system hit point accuracy requirement of ± 0.333 miliradians with 95% confidence.

"b. The proposed Tracer-Burst Obscuration Simulator (TBOS) design for the M60A3 Tank Thermal Sight (TTS) and Extension (TTE) is not acceptable because its configuration is incompatible with the specified constraints and requirements including the biocular optics design of the eye piece of these sights.

"c. Additionally, your Integrated Logistics Support Proposal was found to be unacceptable in several areas."

By letter dated December 4, Loral protested the rejection of its offer to the agency. In response the agency reviewed the evaluation of the Loral proposal, affirmed its conclusion and by letter dated December 29 denied Loral's protest. Loral's protest to our Office followed.

As an initial matter, the agency urges we dismiss the protest as untimely. We agree with the agency that the

protest is indeed untimely; nevertheless, we will consider its merits.

Our Bid Protest Regulations require that if a protest has been initially filed with the contracting agency, any subsequent protest to our Office must be filed within 10 days of notification of or actual or constructive knowledge of initial adverse agency action. 4 C.F.R. § 21.2(a)(3) (1987). As indicated above, Loral was notified of the denial of its agency level protest on December 29. On Friday, January 8, 1988, all federal government offices in the District of Columbia, including our Office, were closed due to snow. We received the protest on January 14. Under our regulations, "working days" means working days of the federal government. 4 C.F.R. § 21.0(d). Although federal offices in Washington D.C. were closed on January 8, this day was a federal working day, as government offices in other locations were open. Booz-Allen & Hamilton, Inc.--Reconsideration, B-225770.2, May 1, 1987, 87-1 CPD ¶ 460. Under such circumstances, the snow day is counted as a working day unless it falls on the last day of the timeliness period. Id. Under this rule the protest was filed 11 days after Loral was notified that its agency protest was denied. Nonetheless, we will consider the matter under 4 C.F.R. § 21.2(c), which provides that our Office may consider an untimely protest in appropriate circumstances. Since we find on the basis of the fully developed record that Loral was unreasonably excluded from the competitive range, we view the protest as one appropriate for our formal decision as it involves action by the agency which is inconsistent with statute and regulation. See Adrian Supply Co.--Reconsideration, B-225440.2, Mar. 30, 1987, 66 Comp. Gen. ___, 87-1 CPD ¶ 357.

In reviewing protests concerning the evaluation of proposals and the resulting determination of whether a proposal is in the competitive range, our Office's function is not to reevaluate the merits of proposals and make our own determinations. Proposal evaluation is the responsibility of the contracting agency, which is most familiar with its needs and must bear the burden of any difficulties resulting from a defective evaluation. Tiernay Turbines Inc., B-226185, June 2, 1987, 87-1 CPD ¶ 563. Procuring officials have a certain degree of discretion in evaluating proposals, and we will examine an agency's evaluation only to ensure it had a reasonable basis. CAP, a Joint Venture, B-229571, Feb. 1, 1988, 88-1 CPD ¶ 95.

The purpose of a competitive range determination in a negotiated procurement is to select those offerors with which the contracting agency will hold written or oral

discussions. Federal Acquisition Regulation (FAR) § 15.609(a); Systems Integrated, B-225055, Feb. 4, 1987, 87-1 CPD ¶ 114. We have consistently defined the competitive range as consisting of all proposals that have a "reasonable chance" of being selected for award, that is, as including those proposals which are technically acceptable as submitted or which are reasonably susceptible of being made acceptable through discussions. Information Systems & Networks Corp., B-220661, Jan. 13, 1986, 86-1 CPD ¶ 30; Fairchild Weston Systems, Inc., B-218470, July 11, 1985, 85-2 CPD ¶ 39. The regulations mirror this definition and provide that if doubt exists as to whether a proposal is to be included in the competitive range, it should be included. FAR § 15.609(a). This is consistent with the mandate of the Competition in Contracting Act of 1984 that military agencies obtain "full and open competition" in their procurements. 10 U.S.C. § 2304(a)(1)(A) (Supp. III 1985). Thus, as a general rule, an agency should endeavor to broaden the competitive range since this will maximize the competition. Systems Integrated, B-225055, supra.

Loral argues throughout its protest that since this was a non-development item (NDI) procurement we should use a more stringent standard in reviewing the agency's elimination of Loral's proposal from the competitive range. We disagree. The Department of Defense's (DOD) NDI program is grounded on the premise that it is cheaper and better to fulfill DOD requirements with items that are or are based on items already in the marketplace than to attempt to develop the items itself using detailed military specifications. 10 U.S.C.A. § 2325 (West Supp. 1988). This program is directed towards the development of the agency's needs and the expression of those needs in the broadest possible way in a solicitation so that NDI's may be submitted. It does not, in our view, significantly impact on the scope of the agency's judgment as to whether a particular proposal in fact conforms with the agency's needs as expressed in the NDI solicitation. Consequently, we will review the agency's elimination of the Loral proposal from the competitive range as we would review such a determination in any case: considering that determination in the context of all the relevant facts and circumstances. See Optical Data Systems-Texas, Inc., B-227755, Oct. 26, 1987, 67 Comp. Gen. ___, 87-2 CPD ¶ 393.

HIT POINT ACCURACY

The Navy found that for two of the four types of vehicles on which the simulator system was to be used, the M60A3 tank and the M2/M3 Bradley Fighting Vehicle, the simulated shot deviation of the protester's proposed system was 10 times larger than that allowed by the RFP. This deviation is

calculated based in part on signals received from gyroscopes and the error factor inherent in those signals. According to the agency, it concluded from the Loral proposal that the firm had offered a configuration using signals from gyroscopes located in the host vehicles, and it used the mathematical formulas in the protester's proposal to calculate simulated shot deviation for the various vehicles. The gyroscope error for the M1 and M1A1 tanks, when factored into the protester's formula, produced an acceptable deviation, but the gyroscope error factor for the M60A3 and M2/M3 vehicles was approximately 10 times larger and when used in the protester's formula produced a shot hit point deviation in excess of that specified in the RFP.

Loral maintains that the agency's conclusion concerning the hit point accuracy was based on its misinterpreting the Loral proposal. The protester states that the simulator it proposed, a BT-41 model which uses a laser system to measure the simulated shots, in fact gave the agency the option of choosing either host vehicle gyroscopes or gyroscopes integral to the simulator. Apparently, integral gyroscope signals are more accurate, while it is less costly to use the host vehicle gyroscope. The protester further maintains that even if the agency believed only a host vehicle gyroscope simulator was offered and that configuration failed to meet the RFP requirements, it could, without a major design change or proposal revision, use integral gyroscopes to achieve the required accuracy.

First, the agency responds that the proposal submitted by Loral only indicated that host vehicle gyroscopes would be used. The agency states that based on past experience with the BT-41, it knew the system had the capability to use integral gyroscopes, but Loral's proposal, as written, offered only host vehicle gyroscopes. While Loral states its proposal offered the agency the option to use either integral gyroscopes, or as a cost-saving alternative, host vehicle gyroscopes, Loral has not indicated exactly where in its proposal the option was offered. It points instead to the fact that while the schematics it proposed showed a host-vehicle configuration, the test data it submitted clearly applied to a system using integral gyroscopes.

Loral argues the agency should have concluded from this that it was being offered a system which could use either type of gyroscope and the option to choose whichever system it decided was appropriate. We do not think that the Loral proposal clearly made such an offer and therefore we think that the agency was reasonable in concluding that Loral's proposal was based on a modified BT-41 system using host vehicle gyroscopes. Nevertheless, for the reasons set forth below we believe that the problems with the Loral proposal

should not have resulted in its exclusion from the competitive range.

It appears that the agency's problems with the hit point accuracy of Loral's proposed system resulted from the protester's rather confusing proposal which seemed to offer a hybrid system based on its already existing BT-41 model using the signals from the host vehicle gyroscopes for accuracy rather than gyroscopes built into the unit as in the standard BT-41. In this regard, the Loral proposal included hit point accuracy calculations which pertained to the standard BT-41 integral gyroscope configuration while appearing to offer a system which used external gyroscope signals. The protester attempted to reconcile this anomaly by explaining that a "special circuit board" would be used to compensate for any errors induced by the use of the host vehicle gyroscope. The agency found the explanation unconvincing and calculated Loral's hit point accuracy using the BT-41 (integral gyroscope configuration) formulas provided in the proposal for the host vehicle configuration offered.

While it is clear that the Loral proposal contained a significant deficiency, the record does not, in our view, support the agency's conclusion that the correction of this shortcoming would require a substantial rewrite of Loral's proposal. On the contrary, we think that the record shows that it may be rather simply remedied. The protester states, and the agency does not disagree, that the proposal already contains much of the material needed to determine the hit-point accuracy of the standard integral gyroscope B-41 configuration. It would not require a major engineering effort to change the gyroscope configuration of the hardware offered back to the standard BT-41 design. According to the protester, the laser unit proposed was merely a standard BT-41 with its integral gyroscopes removed and some circuitry added. The protester states that integral gyroscopes could be easily reincorporated. There is nothing in the record to refute this. The major proposal change needed it seems would be to clearly indicate that the standard BT-41 configuration is to be offered. Hence, in our view the deficiency was one primarily based on poor proposal draftsmanship and an attempt by Loral to reduce the cost of its system rather than the result of a fundamental misunderstanding of the RFP requirements. We do not, of course, make any judgment as to whether the alternate design will in fact meet the RFP, we only conclude that the record does not support the agency's view as to the magnitude of the proposal changes needed and that Loral should have been given the opportunity to attempt to cure this particular proposal deficiency.

TBOS

In the training devices, part of the simulation includes ballistic tracer, burst on impact and obscuration visual effects. A TBOS projects in the vehicle's gunnery sights an image of the simulated projectile while in flight and on impact and adds certain visual obscuring factors (such as smoke) which would occur if live ammunition were fired.

The protester argues that its proposal should not have been downgraded for its failure to offer a biocular^{1/} TBOS design for the M60A3 tank, because the RFP did not require such a configuration. The agency acknowledges that the RFP did not specifically state that a biocular design was required; however, it argues that the performance requirements in the RFP are not met by Loral's monocular^{2/} design. It cites several specification requirements which primarily state that the design proposed not alter or interfere with the normal operation of the crew or tank and that the crew should be able to train with the simulator using only procedures and methods used with live ammunition.

After review of Loral's proposed TBOS, the agency concluded that Loral's monocular design did not meet those specifications because to view the simulation it would require the commander of the M60A3 using the sight to alter the position of his head. We find no reason to disturb the agency's conclusion that the TBOS Loral proposed for the M60A3 was for that reason technically deficient. Loral argues that this deficiency could easily be corrected, and that it is exactly the type of issue which is suitable for discussions. On the other hand, the agency states that simply enlarging the sight will not remedy the defect as that will impinge upon other RFP requirements. While it is not clear as to exactly what remedy would make the TBOS acceptable, the record shows that M60A3 TBOS is only one of the nine sight devices required by the RFP. We do not think under these circumstances that such a deficiency should result in the rejection of the proposal without providing the offeror the opportunity to correct the deficiency.

INTEGRATED LOGISTICS SUPPORT

The final reason cited by the Navy for the rejection of Loral's proposal was that Loral's integrated logistics

^{1/} A biocular sight is one that is viewed by both eyes like a television.

^{2/} A monocular sight is one which is viewed with one eye like a telescope.

support proposal was unacceptable in several areas.^{3/} The agency states that the critical deficiency in this area concerned the system's ability to conduct built-in tests. The RFP required the simulator to have a built-in fault detection system which would operate without additional special test equipment when the device is off the host vehicle. The agency states that Loral's proposal required additional special test equipment to conduct the specified operational checks. Loral on the other hand, contends that its proposal offered the necessary built-in testing and that the agency is confusing this with the recommendation Loral made in its proposal that the Navy purchase certain additional equipment to conduct more extensive testing than required by the RFP. We agree with the protester.

Loral's proposal states on page B-33 that "To meet the requirements in the specification our built-in fault detection and locating system is performed by the TWGSS/PGS computer itself." (Emphasis added.) The proposal specifically referenced specification paragraph 3.2.4.3 which required the ability to perform the tests while not attached to a vehicle. A detailed table of faults that could be identified and isolated was included. The proposal also contained a section at page 1-38 titled "Recommended Test Equipment For Operational Readiness Checks At The Organizational Level," which stated "the contractor has designed special test equipment . . . which would also be valuable." (Emphasis added.) The agency has not provided any detailed explanation as to why these portions of the Loral proposal are not acceptable. Under the circumstances, we think the agency's conclusion that Loral's proposal required additional special test equipment is not supported by the record. We also point out that if the agency was unclear as to the relationship of Loral's "recommended" test equipment to that actually offered, it could have easily requested clarification from the firm.

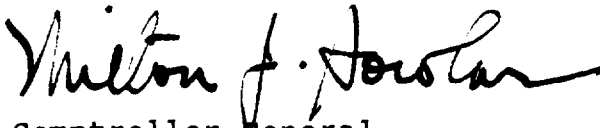
In sum, we have reviewed the protester's proposal and do not find the agency's conclusion that Loral's proposal was deficient in the hit point accuracy and TBOS areas to be unreasonable. While we recognize that agencies are not required to permit an offeror to revise an unacceptable initial proposal when the revisions required are of such a magnitude as to be tantamount to the submission of a new proposal, Coopers & Lybrand, B-224213, Jan. 30, 1987, 66 Comp. Gen. _____, 87-1 CPD ¶ 100, we do not, however, believe that the revisions required here would constitute a

^{3/} The agency implies that there exist other deficiencies, but they are not specified in the agency protest submissions.

major proposal rewrite. We sustain the protest for this reason and we are recommending that the Navy include Loral's proposal in the competitive range.

Loral requests reimbursement for the costs of filing and pursuing this protest. Under the regulations and caselaw applicable to this protest, we do not allow such costs where as a result of our recommendation a protester whose proposal was improperly rejected is given the opportunity to compete for award. See 4 C.F.R. § 21.6(e) (1987); Federal Computer Corp., B-223932, Dec. 10, 1986, 86-2 CPD ¶ 665. Recovery of the costs of filing and pursuing the protest is therefore inappropriate.

The protest is sustained.

A handwritten signature in black ink, appearing to read "Milton J. Fowler". The signature is fluid and cursive, with a long horizontal stroke at the end.

Acting Comptroller General
of the United States